IN THE SUPREME COURT OF TEXAS

NO. 02-1084

IN RE BURLINGTON COAT FACTORY WAREHOUSE OF MCALLEN, INC., RELATOR

ON PETITION FOR WRIT OF MANDAMUS

JUSTICE O'NEILL, joined by JUSTICE JOHNSON as to Part I, dissenting.

I

I agree with the Court that no presumption of finality attaches to the March 25th default judgment. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001). I also agree that the judgment's Mother Hubbard clause, standing alone, is insufficient to establish the judgment's finality. But, contrary to the Court's assessment, additional language in the order provides other indicators of finality. ___ S.W.3d at ___. Accordingly, I would hold that the trial court did not abuse its discretion and deny Burlington Coat Factory Warehouse's mandamus petition.

In *Lehmann*, we rejected a formulaic approach to determining the finality of judgments; even an order that is entitled "final" may not be final. 39 S.W.3d at 200. Instead, we look for a "clear indication that the trial court intended the order to completely dispose of the entire case." *Id.* at 205. While the order here does not say, in so many words, that it is a final judgment or disposes of the

entire case, it clearly indicates that the trial court intended it to be final in this case, which involves one plaintiff and one defendant.

First, the judgment awards the plaintiff, Evangelina Garcia, postjudgment interest "from the date this judgment is signed until paid." The judgment also awards Garcia a specific sum of prejudgment interest "measured from [the] date of judgment." In addition, the judgment states that "all relief not expressly granted is hereby denied" and orders that Garcia "is entitled to enforce this judgment through abstract, execution and any other process necessary." As the Court correctly observes, an interlocutory judgment may not be enforced through execution. ___ S.W.3d at ___; TEX. R. CIV. P. 622. I would presume that the trial court was aware of this limitation and thus would take the trial court's unconditional statement that Garcia "is entitled" to execution, together with its award of pre- and postjudgment interest from the date the judgment was signed and the denial of all relief not expressly granted, as clear indications that the court intended the order to be final.

The same indicia of finality also distinguish this case from *Houston Health Clubs, Inc. v. First Court of Appeals*, 722 S.W.2d 692 (Tex. 1986). In that case, we held that the court of appeals abused its discretion in ordering the trial court to vacate an order granting a motion for new trial. *Id.* at 693-94. The trial court granted the motion after rendering a default judgment on all of the plaintiff's claims except punitive damages. We held that the default judgment was interlocutory because it did not dispose of the punitive-damages claim. *Id.* at 693. We did so because the underlying judgment did not mention the claim "either expressly or *by implication*." *Id.* (emphasis added). While the judgment did provide that the plaintiff "shall have . . . execution" and awarded interest from the "date of judgment," the judgment contained no Mother Hubbard clause, *see*

Judgment, *Erwin v. Houston Health Clubs*, No. 85-07146 (157th Dist. Ct., Harris County, Tex., May 14, 1985), our touchstone for evaluating a summary judgment's finality at the time. *See Mafrige v. Ross*, 866 S.W.2d 590, 592 (Tex. 1993), *overruled by Lehmann*, 39 S.W.3d at 204. Moreover, the judgment generally provided that interest would run from "the date of judgment," whenever that might be, whereas in this case postjudgment interest ran from a specific date — "the date this judgment is signed." By including in the order a statement that "all relief not expressly granted is hereby denied" and otherwise treating the order here as final, the trial court implicitly disposed of Garcia's exemplary damages claim. Because the trial court's judgment was not interlocutory, the court did not abuse its discretion in denying Burlington's motion to quash execution.

II

I would additionally deny mandamus relief because Burlington has presented us with an insufficient record. The trial court's order denying Burlington's motion to quash execution recites that the court "considered the motion, Plaintiff's Response thereto, along with the evidence presented" and "finds that the motion is not well taken, because of the Rule 11 agreement, because the default judgment was final, and pursuant to the doctrines of judicial estoppel and judicial admission." Rule 52.7(a) of the Rules of Appellate Procedure provides that a relator "must file with the petition . . . (1) a certified or sworn copy of *every* document that is material to the relator's claim for relief . . . and (2) a properly authenticated transcript of any relevant testimony from any underlying proceeding, . . . or a statement that no testimony was adduced in connection with the matter complained." TEX. R. APP. P. 52.7(a) (emphasis added). Burlington did not file Garcia's

response to the motion to quash, although the trial court order specifically states that the court based its ruling, in part, on the response. Burlington also failed to provide the Court a transcript of any hearing on the motion to quash, although the order suggests that evidence was presented. *See* TEX. R. APP. P. 52.7(a)(2). Nor did Burlington file a statement that no testimony was adduced in connection with its motion to quash. *See id.* Burlington's failure to provide the required record is significant here because it may have shown that the parties treated the order as final, and thus shed light on the order's finality. *See M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 674-75 (Tex. 2004). I would deny mandamus relief.

Harriet O'Neill
Justice

OPINION DELIVERED: July 1, 2005.